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In The Supreme Court of the United States

ROBERT J. DEVLIN, RETIRED EMPLOYEES PROTECTIVE ASSOCIATION and FREDERICK RINCKWITZ, individually and as representatives of all members of the class,

Petitioners,

v.

ROBERT A. SCARDELLETTI; FRANK FERLIN, JR.; JOEL PARKER; DON BUJOLD, as Trustees of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Notwithstanding this Court's reversal and remand in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), the United States Court of Appeals for the Fourth Circuit, less than two months after this Court's carefully considered decision, nevertheless approved the class action settlement without any subsequent briefing, argument or hearing in *Scardelletti v. DeBarr*, 43 Fed. Appx. 525, 2002 U.S. App. LEXIS 15940 (2002) (unpublished), essentially relegating this Court's reversal of the exclusion of petitioners from meaningful participation in the hearing on the settlement, as merely a "round of meaningless relief," a phrase from the majority decision in *Devlin v. Scardelletti*, 536 U.S. 1 at _, 122 S.Ct. 2005, 153 L.Ed.2d 27 at 40 (2002).

Subsequently, the district court in Baltimore issued an injunction upon the petitioners, on the basis of the same settlement, but without giving any consideration whatsoever to this Court's decision that the petitioners had been wrongfully excluded from participating in the hearing in seeking to oppose the settlement.

Nevertheless, the Fourth Circuit affirmed the Baltimore court's injunction in another unpublished decision entitled *Scardelletti v. Rinckwitz* (Appendix at A-3), issued from a location extremely inconvenient for the petitioners, prohibiting them and the separate class of retirees represented by them in the district court in the Southern District of New York from seeking remedies over their claims in that court, where the petitioners' standing as parties plaintiff entitled to be heard had been long established, with respect to claims and parties over which the Baltimore court did not have jurisdiction.

Accordingly, the questions presented are:

(1) Did the injunction violate the All Writs Act, 28 U.S.C. § 1651, and the federal statutes that specifically conferred jurisdiction over petitioners' claims and upon all of the parties who were defendants, upon the United States district court in New York?

(2) Did such injunction violate petitioners' due process and First Amendment rights?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Robert J. Devlin and Frederick Rinckwitz were appellants below, individually and, together with the Retired Employees Protective Association, as representatives of the class of objecting elderly retired employees.

The respondents in this Court, appellees below, are: Robert A. Scardelletti, Frank Ferlin, Jr., Joel Parker, and Don Bujold, as Trustee of the Transportation Communications International Union Staff Retirement Plan; and George Thomas Debarr and Anthony Santoro, Sr., individually and as representatives of subclasses of all persons similarly situated.

Other persons named in the court of appeals' caption, but who neither participated in the court of appeal nor are respondents here, are: Donald A. Bobo, R.I. Kilroy, F.T. Lynch, Frank Mazur, Andrew Hagan, Defendants; and A. Meaders, James H. Groskopf, Thomas C. Robinson, Doyle W. Beat, Miriam E. Parish, Robert A. Parish, Desmond Fraser, James L. Bailey, Dorothy Deerwester, Thomas J. Hewson, Clay B. Wolfe, Kenneth B. Lane, Brian A. Jones, and Charles O. Swasy, Parties in Interest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The district court's unpublished injunction against petitioners (per Motz, D.J.) dated November 20, 2001, is in the Appendix ("Pet.App.") at A-26. The court of appeals' *per curiam* affirmance *Scardelletti, et al. v. Rinckwitz, et al.*, (unpublished, per Williams, Michael, and Shedd, JJ.) is dated July 3, 2003. (Pet.App. A-3). The court of appeals' order dated July 29, 2003, denying rehearing and rehearing *en banc* also is not otherwise published. (Pet.App. A-1)

STATEMENT OF JURISDICTION

The court of appeals entered its *per curiam* affirmance on July 3, 2003 (Pet.App. A-3), and a petition for rehearing and rehearing *en banc* on July 29, 2003. (Pet.App. A-1) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are the First, Fifth, Seventh and Fourteenth Amendments of the United States Constitution and the All Writs Act, 28 U.S.C. § 1651, the Age Discrimination in Employment Act ("ADEA"), as amended, 29 U.S.C. §§ 621, 623, 626, 630, the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a), and the Internal Revenue Code, 26 U.S.C. § 411(a)(7) and (d). The foregoing provisions are in the Appendix at Pet.App. A-38 to A-58.

STATEMENT OF THE CASE

Petitioners assert that if their connection with the settlement proceeding was regarded by the district court as being so tangential that they had no standing to be heard in objecting to

its proposed terms, and were wrongfully excluded as participants entitled to be heard, as this Court held in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), then the terms that petitioners found to be objectionable could not be used as a basis for securing and injunction against their seeking remedies for the injuries in another federal court, pursuant to the statutory provisions conferring jurisdiction upon that court, for actions that substantially demolished the retirement benefits of the elderly retirees, particularly when the class representative who negotiated the objectionable settlement terms in secret discussions knowingly consented to self-serving releases so staggering in scope and overbreadth that were inconsistent with the fiduciary duties that the persons negotiating the terms owed to the petitioners and the class of elderly retirees represented by them, and also were violative of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626 (Pet.App. A-44) because they purported to release claims "of any kind whatsoever in law, by statute, or in equity, whether known or hereafter discovered and whether now or hereafter fully, partially, or not disclosed to the Releasing Parties . . . ." (Pet.App. A-34)

The carefully considered decision of this Court in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), was rendered an exercise of futility by the Fourth's Circuit's condonation of petitioners' exclusion from meaningful participation from the settlement by proceeding to approve the settlement, without hearing one word further by or on behalf of the petitioners, almost immediately after the reversal and remand was issued by this Court by an unpublished decision *Scardelletti v. DeBarr*, dated August 8, 2002. (Pet.App. A-17)

The injury to the petitioners was aggravated by the action of the district court in Baltimore in issuing its injunction even

before the reversal and remand was issued by this Court. (Pet.App. at A-26) but subsequently affirmed by the Fourth Circuit as if this Court's decision made no difference whatsoever.*Scardelletti, et al. v. Rinckwitz, et al.*, Pet.App. A-3 (4th Cir. Jul. 3, 2003) (unpublished).

Since the Solicitor General was an active participant in the prior consideration given to this matter by this Court, it is respectfully submitted that the interest of justice in the proper procedures applicable to the litigation of class actions warrants the comments of the Department of Justice on the deplorable situation that is related by this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for three reasons.

First, the circuits are irreconcilably divided on whether a cost of living adjustment ("COLA") is an "accrued benefit" that can not be taken away from retirees without violating ERISA. If so, as the Seventh and Ninth Circuits have previously held, in *Hickey v. Chicago Truck Drivers Union*, 980 F.2d 465 (7th Cir. 1992), and *Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985),the injunction that the Fourth Circuit affirmed to enforce compliance with a class action settlement would be invalid because it was issued to enforce compliance with an illegal action, the elimination of the COLAs of the elderly retired employees.

Under the All Writs Act, under which the injunction purportedly was issued, such writs issued can only be under that statute if their purpose is "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This is a condition

imposed by the precise language used in the statute.

Since the injunction was issued to enforce compliance with a class action settlement that was unlawful under ERISA, because of its devastating reduction in the "accrued benefits" of elderly retired employees of the Transportation Communications International Union ("TCU"), by eliminating the Cost of Living Adjustments to their pensions, the injunction was invalid under the All Writs Act, because it was issued to compel compliance with an illegality and therefore was unauthorized "agreeable to the usages and principles of law," and as a consequence unauthorized under the All Writs Act.

Second, this injunction is violative of a further condition of the All Writs Acts, namely, that writs issued under it are invalid unless they are "necessary or appropriate in aid of [the] respective jurisdictions." 28 U.S.C. § 1651(a)

This statutory provision very recently was given effect in *Syngenta Crop. Protection v. Henson*, 537 U.S. 28, 123 S.Ct 366, 154 L.Ed.2d 368 (2002).

Under *Syngenta*, *supra*, the All Writs Act is not an independent grant of jurisdiction. In interpreting the All Writs Act, the decision in *Syngenta* confirms the applicability of the principle laid down in *Clinton v. Goldsmith*, 526 U.S. 529, 534-535 (1999), the express terms of the All Writs Act confine a court "to issuing process `in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction."

As discussed below, the decision in *Syngenta* is *a fortiori* applicable to the present appeal since statutory jurisdiction over the claims of the petitioners that the injunction was issued to enjoin did not exist in the district court in

Maryland, but in a federal district court in another circuit under the specific provisions contained in acts of Congress. Based on the All Writs Act, the injunction therefore was incorrectly issued by the Baltimore court.

Third, the injunction is invalid as "fruit of the poison tree" because it was used to enforce a class action settlement concerning which petitioners were wrongfully deprived of an opportunity to be heard, as this Court held in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002).

The decision of this Court was disregarded by the Baltimore district court because it had not even been decided on November 20, 2001, when the Baltimore court issued the injunction. (Pet.App. A-26) The denial of the right of petitioners and the class of retirees whom they represented in another court to participate in a meaningful way in the settlement process or in the court proceeding in Baltimore was simply viewed as detail that could be overcome by rhetoric that is a widely recognized flaw of the class action settlement process.

The basis on which the injunction was granted, as an outgrowth of merely a telephonic conference, was an exercise in futility for petitioners that was ignored by the Fourth Circuit when it affirmed the injunction.

Judicial notice is requested to be taken of the authoritative observation that fairness hearings such as conducted by the district court in Baltimore have degenerated into the antithesis of due process as "typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel" in which the district courts "engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement. Jonathan R.

Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 46-47 (1991).

In such circumstances, the effects of the injunction in violating petitioners' First Amendment rights to petition and be meaningful heard on behalf of the class of employees represented by them in a less hostile court which had jurisdiction over their claims, unlike the Baltimore court, is of the highest importance, and not properly made the subject of such blatant interference without violating First Amendment and Due Process rights. *Brotherhood of Railroad Trainman v. Virginia Ex Rel. Virginia State Bar*, 377 U.S. 1, 8, 12 L.Ed.2d 89, 94, 84 S.Ct. 1113 (1964, *reh'g denied*, 377 U.S. 960, 12 L.Ed.2d 505 (1964), is applicable to the Retired Employees' Protective Association, a petitioner herein, particularly in view of the following point made in petitioner's Reply when the case was previously before this Court (Reply, p. 10, fn2):

> "Respondents' further suggestion that petitioner stands almost alone in objecting to the settlement (see BIO) is also false. Petitioner objected on his own behalf and also (as a representative of an association of retirees) on behalf of more than *half* of the retirees. See Pet. 4."

That the situation in which the petitioners have been placed as a result of the fact that the class representative and his attorney who was on the payroll of the respondents themselves and secretly proceeded to negotiate a settlement that they knew to be opposed by the petitioners would be subject to a due process violation was acknowledged in the respondents' prior brief to this Court (pp. 17-18):

> "Indeed, as *Hansberry v. Lee*, [311 U.S. 32, 61 S.Ct.

> 115, 85 L.Ed. 22 (1940)], holds, where the named representative parties in a class action case do *not* adequately represent the interests of the other class members, it violates due process to accord an adverse judgment in that case *res judicata* effect against those other class members. *See* 311 U.S. at 42-43 (`[T]h[e] members of a class not present as parties to the litigation may be bound by the judgment,' consistent with due process of law, only `where they are in fact adequately represented by parties who are present.')." (Emphasis added.)

The prior brief of respondents when it was before this Court further stated (p. 30):

> "Once a proposed settlement is reached, it is axiomatic that the named representative party who has negotiated the settlement [Kraft and Santoro] does *not* adequately represent either the interests or the viewpoint of those class members opposed to the settlement."

Directly in point is the following statement of this Court in *Brotherhood of Railroad Trainman v. Virginia Ex Rel. Virginia State Bar*, 377 U.S. 1, 8, 12 L.Ed.2d 89, 92, 84 S.Ct. 1113 (1964):

> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of

course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge."

"The judgment and decree are vacated and the case is remanded for proceedings not inconsistent with this opinion."

I. REVIEW OF AN INJUNCTION TO SILENCE ELDERLY RETIREES REGARDING THEIR OPPOSITION TO A CLASS ACTION SETTLEMENT VIOLATIVE OF THEIR ERISA RIGHTS IS URGENTLY NEEDED

The district court's injunction states that it was issued to enjoin the petitioners "from making any filing in any forum against any person, including counsel in this case of their law firms, that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter. . . ." (Pet.App. A-26)

Included in the terms of the Settlement Agreement and Release is a provision under which its declared that the petitioners and the class of retired employees that they represent ". . . will not object to the Court's entry of an order, substantially in the form attached hereto as Exhibit 3, declaring that the amendment to the Plan providing for an automatic COLA [Cost of Living Adjustment] effective January 1, 1991 (1991 `COLA Amendment') is null and void as of its inception and of no force or effect." (Pet.App. A-33, § 4)

Petitioners objected to such provision on the basis that the COLA that could not be revoked as to them without violating ERISA because it was an "accrued benefit."

The settlement itself as approved by the district court was to the contrary, however.

The injunction therefore was invalid because it was in furtherance of unlawful action as set forth in the settlement agreement, and contrary to public policy.

Moreover, when the reversal and remand from this Court occurred, in June 2002, in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), a different panel of Fourth Circuit judges had under consideration another appeal presenting the same question of whether the revocation of such a COLA was unlawful because it was an "accrued benefit." In that separate appeal, the Tax Division of the Department of Justice strongly asserted that such action was unlawful.

At the time, this was not known to petitioners.

However, the dates of the relevant documents make this overlapping situation regarding two appeals in the Fourth Circuit very clear.

The brief of the Department of Justice, by Eileen J. O'Connor, Esq., Assistant Attorney General, for the Commissioner of Internal Revenue as the appellant to the Fourth Circuit in *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commission of Internal Revenue* is dated May 2002.

The Reply Brief of the Department of Justice in the same case is dated June 2002.

The Fourth Circuit's decision in that appeal is dated January 31, 2003. *Board of Trustees v. Commissioner of Internal Revenue*, 318 F. 599 (4th Cir. 2003).

Thus it is evident that the position of the Department of Justice before the Fourth Circuit was contrary to that which is embodied in the Settlement Agreement involved in the present case at the same time that the Fourth Circuit concurrently had under consideration in the remand from this Court in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), which was issued on June 10, 2002, and decided by the Fourth Circuit on August 8, 2002, without any briefing, argument, or hearing on the part of petitioners, or any intimation that another appeal was before it involving the assertion by the United States Government of a position inviolability of such a COLA as an "accrued benefit" under ERISA that was the same as the position taken by petitioners in their opposition to the settlement involved in the present litigation.

The split in the Circuits that exists on the issue is indicated in the Department of Justice's brief to the Fourth Circuit. As stated in the D.O.J. Brief at pages 12-14:

> "The Seventh and Ninth Circuits both have held that a COLA or similar benefit given to a plan participant that adjusts the amount of a retirement benefit is an "accrued benefit" that cannot be eliminated without violating ERISA' anti-cutback rule. *See Hickey v. Chicago Truck Drivers Union*, 980 F.2d 465 (7th Cir. 1992) (COLA); *Shaw v. International Association of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985) (a "living pension" feature). Significantly, neither court distinguished between employees who were employed when the benefit was added and those that were retired. The Seventh and Ninth Circuits properly did not distinguish between the granting of an accrued benefit to the current or former employees, because that distinction is not

relevant under ERISA.

"The Tax Court also mistakenly thought that its holding was supported by a plain reading of the relevant statutes, because the anti-cutback rule (I.R.C. § 411(d) (6), is applicable to all plan "participants," which "accrued benefits" are described by § 411(a)(7) as being given to an "employee." The Tax Court believed that Congress's use of the narrower term "employee" in § 411(a)(7) meant that only an employee, i.e., a current employee, could obtain an accrued benefit. The court's point does not withstand analysis. Throughout ERISA, there are parallel provisions between Title I (the Labor provisions) and Title II (the Internal Revenue Code provisions). The Title I definition of "accrued benefit" does not use the word "employee," but instead uses the broader term "individual." Since the Tax Court conceded (A. 58 n.4) that the term "accrued benefit" should be defined the same throughout ERISA, its heavy reliance of the word "employee" in Title II is misplaced since Congress did not use that term in the parallel Title I provision. Indeed, in other places of the Code, such as I.R.C. §§ 401(a)(33), 402(c)(1) and 411(a)(1), Congress has used the term employee in places where it must have been referring to former employees as well as current employees. (Emphasis added.)

"The Tax Court also misconstrued the purpose of the term "accrued benefits" found in ERISA. The Tax Court believed that ERISA should be interpreted as protecting only retirement benefits that were promised to employees while they were working. But it is plain that ERISA does more: it is designed to protect all retirement benefits, and no distinction

is drawn based upon the timing of the promise.

> "The decision of the Tax Court is wrong, and it should be reversed." (Emphasis added.)

The split in the circuit's is made clear by the reference in the government's brief at page 38 to the fact that the Tax Court's decision "relied heavily on an unpublished district court opinion," namely, the Baltimore district court's decision in this same case, *Scardelletti v. Bobo*, No. JFM-95-52, 1997 U.S. Dist. LEXIS 14498 (D.Md. Sept. 8, 1998).

The Department of Justice Brief went on to indicate that in reaching that decision, the Baltimore district court unfortunately had "never scrutinized the Treasury regulation or the applicable legislative history," but instead reached a "conclusion [that was] simply incorrect." (p. 38, emphasis added.)

The conclusion of the Tax Division of the Department of Justice that a district court decision that had not adequately scrutinized the applicable Treasury regulations or the legislative history, and that never had been subject to appellate review should have alerted the Fourth Circuit to the knowledge that, upon receipt of the reversal and remand of its earlier decision from this Court, due process required hearing further from petitioners, rather than merely rubber-stamping the district court's earlier injunction without giving any consideration to this Court's decision reversing its preclusion of petitioners from any meaningful participation in the hearing on the settlement.

Moreover, at the very time that the Fourth Circuit issued its unpublished decision on August 8, 2002, without further hearing, briefing or argument, stating that "Devlin cannot show that, by authorizing elimination of the COLA, the

settlement authorizes the continuation of illegal conduct under ERISA, such that its approval by the district court was improper'" (Pet.App. A-25), the Fourth Circuit already was on notice that the contrary was true because it had in its possession a brief from the Tax Division of the Department of Justice on behalf of the Commissioner of Internal Revenue authoritatively refuting the Fourth Circuit's conclusion, and that the revocation of an identical COLA involved action that was illegal because it was violative of "the anti-cutback rule" of the Internal Revenue Code, I.R.C. 26 U.S.C. § 411(a)(7)(A)(i), and also stating that (D.O.J. Brief p. 17):

> "Indeed, a number of courts have so held. *See*, *Hickey v. Chicago truck Drivers Union*, 980 F.2d 465, 468-469 (7th Cir. 1992); *Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Income Trust*, 134 F. Supp.2d 189, 197-201 (D. Mass. 2001); *Kohl v. Association of Trial Lawyers of America*, 183 F.R.D. 475, 479 (D. Md. 1998). *Cf. Shaw v. International Association of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985).

The Fourth Circuit's further conclusion that the district court did not abuse its discretion "in denying to allow Devlin discovery" is also incorrect as shown by the decision on the claims involving conflicts of interest and inadequate representation (Pet. App. A-25) ultimately reached by the Fourth Circuit in *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. Commissioner of Internal Revenue*, 318 F.3d 599 (4th Cir. 2003), in which it held that the addition of the COLA was not an "accrued benefit" because it was merely a gratuity for pre-1991 retirees that was "never anticipated as a retirement benefit before their retirement through either the statute or the Plan in its then-existing form. (318 F.3d 599, 605)

The Fourth Circuit's decision in the *Sheet Metal Workers' National. Pension Fund* case is inconsistent with its decision in the instant case and supportive of petitioners position for two reasons:

First, because the COLA here involved also was eliminated for post - 1991 retirees and thus clearly violated the anti-cutback rule; and

Second, because the addition of the COLA involved in the instant case was no gratuity but was specifically promised as a benefit to the retirees in the then existing plan before the plan was amended.

Before the approval of such an amendment eliminating the COLA was ever applied for or secured from the Secretary of the Treasury, the COLA was a part of the plan that had been specifically approved by the Treasury Department and relied upon by the retirees.

Thus its unilateral revocation contrary to the terms that had been previously approved not only had been promised to them but also constituted a violation of what had been previously approved by the Internal Revenue Service.

In addition, Mr. Devlin, a former officer of the TCU, had previously put the respondents on notice that he was prepared to testify that the COLA had long before been adopted as an objective of the Retirement Plan, once its finances reached a sufficient level, and that its adoption therefore was not gratuity, but a conscious decision intended to be in the nature of a permanent adjustment of the pension to put it on the same basis as an accrued benefit was adopted in *Hickey v. Chicago Truck Drivers Union*, 980 F.2d 465 (7th Cir. 1992), and in *Shaw v. Internal Association of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir.

1985), because the provision was intended to be in the nature of a "living pension adjustment."

In his letter of July 29, 1997 to the Court, Mr. Devlin stated that the COLA was "non-gratuitous" to his own direct knowledge. Therefore, under the cases cited in footnote 2 of the Fourth Circuit's opinion in the *Sheet Metal Workers'* case, *supra*, the settlement here involved should not have been approved because of the failure of the district court to hear any testimony on this disputed fact issue of crucial importance.

The elimination of the COLA in the instant case was destructive of a "living pension adjustment" as held in *Shaw*, *supra*, because it reduced the retirement benefits of Mr. Devlin and other elderly retirees by 45% and more.

The split in the Circuits as to whether the revocation of the COLA represents an unlawful violation of the "accrued benefit" guarantee of ERISA together with the inconsistency of the Fourth Circuit's determination with the analysis of the relevant statutory provisions by the Tax Division of the Department of Justice, as well as with the subsequent Fourth Circuit decision, makes review of the issue by this Court of great importance. The use of an injunction to silence the objections of elderly retirees that an "accrued benefit" that was an inalienable part of their pensions had been unlawfully taken away from them by virtue of a class action settlement concocted behind closed doors that was violative of petitioners' retirement rights guaranteed under ERISA entailed a violation of their due process rights, as indicated by this Court in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), which states (536 U.S. 1, 37:

> "The District Court's approval of the settlement -- which binds petitioner as a member of the class --

amounted to a "final decision of [petitioner's] right or claim" sufficient to trigger his right to appeal. See *Williams v. Morgan, 111 U.S. 684, 699, 28 L. Ed. 559, 4 S. Ct. 638 (1884)* (describing the cases discussed above). And like the appellants in the prior cases, petitioner will only be allowed to appeal that aspect of the District Court's order that affects him -- the District Court's decision to disregard his objections. Cf. supra, at 4. Petitioner's right to appeal this aspect of the District Court's decision cannot be effectively accomplished through the named class representative -- once the named parties reach a settlement that is approved over petitioner's objections, petitioner's interests by definition diverge from those of the class representative." (Emphasis added.)

II. WHETHER THE COURT LACKED AUTHORITY TO ISSUE AN INJUNCTION UNDER THE ALL WRITS ACT THAT IS ALSO VIOLATIVE OF DUE PROCESS AND FIRST AMENDMENT RIGHTS WARRANTS REVIEW

A. The Injunction Deprives Petitioners of Courts Having Jurisdiction of Their Claims Under The ADEA

The ADEA provides that age discrimination claims are required to be asserted only against an "employer." (29 U.S.C. § 623(a) and (d).)

In this case, the "employer" of the retirees was also a labor organization, the Transportation Communications International Union ("TCU").

However, the TCU was not a party in the action in the Baltimore district court, but only in the actions that petitioners had commenced in the Southern District of New York.

Thus in enjoining petitioners from litigation in the only court that had jurisdiction over their various claims of age discrimination and retaliation, the Baltimore district court did not give effect to the All Writs Act, 28 U.S.C. § 1651(a), but violated it under the holding in *Syngenta Crop Protection v. Henson*, 537 U.S. 28, 123 S.Ct. 366, 154 L.Ed. 2d 368 (2002).

The All Writs Act therefore can not be used to create jurisdiction in a court that does not have it, or take it away from another court that does have it, under the terms of an Act of Congress, the ADEA, under 29 U.S.C. § 626(c)(1), which specifically provides that "any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purpose of this Act . . . ." (Emphasis added.)

Therefore, since the injunction is violative of an Act of Congress, because the Baltimore district court was not a "court of competent jurisdiction" as well as being inequitable because it places petitioners at the mercy of a court that is both a forum non conveniens for them, and dominated by parties with conflicting interests, the review of whether the injunction's reliance on the All Writs Act was contrary to the recent holding in *Syngenta*, *supra*, therefore is of great importance.

Mr. Devlin's affidavit of December 12, 1997, submitted shortly after the Baltimore litigation was commenced by the Trustees, apparently to escape any scrutiny for their acts in the case being litigated in New York, at that time already

was pending for at least two years, states:

> "7. My slender financial resources render it impossible for me to litigate this action effectively in the United States District Court for the District of Maryland, located in Baltimore, because I and the other plaintiffs, who are class representatives in Devlin v. Transportation Communications Int'l Union, 95 Civ. 10838 (JFK), all live in the New York City metropolitan area."

The result was the abrogation of the First Amendment and due process rights of Mr. Devlin and the retirees who were REPA members, and liability on the part of the Trustees for violation of their fiduciary duties by their using the tactic of forum-shopping to harass, oppress, and unlawfully silence Mr. Devlin and the other retirees who are members of REPA.

The injunction also is inequitable because it was procured by parties with conflicting interests in furtherance of a settlement agreement negotiated behind closed doors, containing provisions known to be diametrically opposed to those of petitioners, created a situation that the courts below declined to consider.

An irreconcilable conflict in the circuits as a result of the decision below and the Seventh Circuit's decision in *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986).

Since the petitioners were denied intervention or the ability to participate meaningfully in the hearing regarding the settlement agreement, both by the district court or in argument before the circuit court, the parties in the Baltimore litigation were unable to stipulate away the petitioners' rights and those

of the class that they represent in the New York litigation, as to entities that were not even parties in the Baltimore litigation, without depriving petitioners of due process.

The settlement involved herein was a product of "backroom negotiations" of the type that was condemned by the Seventh Circuit in *Secretary of Labor v. Fitzsimmons*, *supra*, in language that is directly applicable to the injunction herein (805 F.2d at 695-6):

> ". . . parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. . . . And, of course, a court may not enter a consent decree that imposes obligations on the party that did not consent to the decree." (Emphasis added.)

B. Jurisdiction Was Lacking Under the All Writs Act ALSO Because There Was No Irreparable Injury

Under the *Fitzsimmons* case, *supra*, (805 F.2d at 697-8), the "backroom negotiations" that produced the settlement were also invalidated by the conflicts of interest of those persons who were involved in the negotiations.

As emphasized by the court in the *Syngenta* case, *supra*, the language of the All Writs Act authorizes the issuance of writs only when they are "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

The "usages and principles of law" include as a cornerstone a principle that goes back to the Chancellor of the Exchequer, namely, that no jurisdiction for the issuance of an injunction exists without the existence of irreparable injury.

In this case, the putative basis for the injunction is the settlement agreement. Under the terms of the settlement agreement itself, however, irreparable injury does not exist, and the district court therefore was without jurisdiction to issue it, since the settlement agreement itself provides that "a court of competent jurisdiction" may determine "any provision of this Agreement" to be "illegal, void, or unenforceable," or without "force or effect." (Pet.App. A-35) Such a determination would not otherwise affect the settlement, however, the same clause provides that "the illegality or enforceability of such provision shall have no effect upon, and shall not impair the legality or enforceability of, any other provision of this Agreement." *Id.* As a consequence, a holding that the injunction is illegal or unenforceable under the All Writs Act or Rule 65(d) since it was issued in furtherance of provisions could not possibly be regarded as "irreparable injury" under standards of equitable jurisdiction required for the issuance of an injunction that have been consistently applied since the courts of equity were first established.

The injunction's invalidity on due process grounds is indicated by its use to enforce the compulsory release of claims that appellants "may hereafter discover" even though they "are presently unknown or unsuspected or [based upon] facts in addition to or different from those now known about the 1991 COLA Amendment" (Pet.App. A-34, ¶ 7; emphasis added), under the terms of a Settlement Agreement negotiated by class counsel who consented to such one-sided, inequitable provisions in secret negotiations from which appellants were

excluded.

Furthermore, as stated above, it is well settled that only the court in Southern District of New York has jurisdiction over the age discrimination, retaliation, tortious conversion and related claims that are pending against the TCU, the former employer of the retirees, since those claims must be asserted against a former employer under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623(a), 630(b). *See Falbaum v. Pomerantz*, 891 F. Supp. 986 (S.D.N.Y. 1995). Because the TCU is not a party in the Baltimore litigation that court is not a "court of competent jurisdiction" under the All Writs Act.

C. The Injunction Caused Irreparable Injury Rather Than Preventing It

Even if the COLA were held not to be an "accrued benefit" under ERISA, an irreconcilable conflict would exist with decisions in the Third and Sixth Circuits under which promises of benefits by ERISA fiduciaries are enforceable and not subject to revocation even though the benefits in question were not vested.

James v. Pirelli Armstrong, 305 F.3d 439 (6th Cir. 2002), *reh'g, en banc, denied*, 2002 U.S. App. LEXIS 26463 (6th Cir. Dec. 2002), *cert. denied*, __ U.S. __, 155 L.Ed. 2d 1062, 123 S.Ct. 2077 (2003), involved the rights of retired employees to health insurance.

Under the plan involved in *James v. Pirelli Armstrong*, 305 F.3d 439 (6th Cir. 2002), it was not disputed that the employer had reserved the right to terminate the health insurance benefits for retirees. However, the employer had separately given employees false assurances concerning the employer's intention to continue such benefits for retirees.

A district court decision dismissing the retirees claims therefore was reversed on the basis that such false statements gave rise to liability for breach of fiduciary duty on the grounds that "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA," as held in *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996).

As a further basis for its decision in reversing the district court, the Court stated (305 F.3d 439 at 453-4):

> "This factual scenario was presented in Unisys where the Third Circuit affirmed the district court's order finding that the plaintiffs could maintain a claim for breach of fiduciary duty under ERISA since `Unisys affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life.' *In re Unisys Corp., 57 F.3d at 1264.* As the Third Circuit noted, `when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries.'" Id.

Further, when the motivation in reducing the benefits is a result of age discrimination, retaliation, political opportunism, and/or self-dealing by fiduciaries, as alleged by the petitioners in claims in the New York litigation, they are entitled to recourse to the benefits provided by Second Circuit law since the District Court for the Southern District of New York is the "court of competent jurisdiction" because the employer is a party defendant in that court.

The public interest involved in the prosecution of such statutory claims is such that they are not subject to being

suppressed by an injunction obtained by the fiduciaries who have conflicting interests because they and/or their insurers are subject to individual liabilities in the New York litigation.

It is not disputed that the petitioners were assured by the present trustees as well as their lawyers and actuaries that they would not be deprived of the COLA because doing so would constitute an impermissible cutback in accrued benefits.

As stated during the deposition of Daniel Rudin, Actuary for the Retirement Plan, in the Maryland litigation entitled Scardelletti, et al. v. Bobo, et al. (D.C. Md., TR 5/31/96, pp. 90-91):

> "Q And you make a statement that eliminating the COLA amendment altogether would be a violation of 411(d)(6) of the Internal Revenue Code as an impermissible cutback in accrued benefits; is that correct?
>
> "A Yes.
>
> "Q And why would that - would 411 (d)(6) preclude you from cutting back the COLA with respect to individuals who were already retired when the COLA was adopted?
>
> "A I believe so, yes.
>
> * * * * *
>
> "Q But Mercer has not done any research of that issue?
>
> "A I disagree with that statement.

"Q Well, have you? Have you researched whether cutting back benefits or eliminating COLA that's adopted with respect to retirees who did not work a day to accrue benefit [sic] would, in fact, be an impermissible cutback?

"A Yes, we have.

"Q And what was your conclusion?

"A That it would be." (Emphasis added.)

When the trustees later acted contrary to their own actuary's expert advice after the petitioners and the elderly retirees relied upon it in their budgeting for the retirement commitments, the trustees nevertheless as a matter of equity should be required to honor the assurances previously given by them in their capacity as fiduciaries to the elderly retirees under the Third and Sixth Circuit decisions cited above.

See 1A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 62, p. 360 (4th ed. 1987).

As stated in *Prince de Bearn v. Winans*, 111 Md. 418, 477-78 (1858):

". . . the fact of the existence of the fiduciary relation to which we have referred opens all contracts and transactions, resulting to his disadvantage, made between him and his trustees relative to the trust estate, to the inspection and review of a Court of Equity. In *Pomeroy in Equity*, where transactions between trustees and *cestui que trust* are treated as forming an exception to the rule concerning mistake of law, the established doctrine of equity in reference to them is well stated, in 3rd

Edition, Vol. 2, page 1494, as follows:

> "Sec. 848. A particular application of the foregoing rule requires a special mention. Where an ignorance or misapprehension of the law, even without any positive, incorrect or misleading words or incidental acts, occurs in a transaction concerning the trust between two parties holding close relations of trust and confidence, injuriously affecting the one who reposes the confidence, equity will in general relieve the one who has thus been injured."

Moreover, since the only evidence in the record in the district court, was that such an injunction would cause irreparable injury, not prevent it (Devlin Aff. 9/21/01), no jurisdiction or authority existed for the issuance of such an injunction, under established principles of law, and it therefore should be reversed under *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999).

In addition, details concerning the disastrous investment results for which appellee Scardelletti and the other trustees were responsible are set forth in the Devlin affidavit of April 14, 2000 and in the case assigned to Judge Martin in the Southern District of New York to the extent that they were available (Amd. Cmplt. in S.D.N.Y. 00 Civ. 0043).

The dissipation of the assets of the Retirement Plan by a binge of speculating in "junk" common stock securities was shown to be responsible for any insufficiency of the funds needed for the payment of the Cost of Living Adjustments that had been promised to all of the retirees to maintain their pensions at something approaching the equivalent of their value at the time they were granted, otherwise known as "real

dollars," not the cost of such adjustments needed to ameliorate for the ravages of inflation upon devalued dollars. (Devlin Aff. 9/21/01, ¶¶ 4-22)

Further, reliance upon the terms of a settlement in litigation in which appellants are not parties, in order to interfere with appellants' litigation rights in litigation pending in other courts where they are parties, and have substantial interests in pending litigation claims, constitutes a denial of due process of law and a violation of First Amendment rights.

The terms of the Settlement Agreement and Release that purportedly would release those same fiduciaries are also directly contrary to the Older Workers Benefit Protection Act in providing that (Pet. App. A-33-34):

> "6. Effective on the date the Order becomes a Final Order, for and in consideration of the undertakings described in this Agreement, the members of the Defendant Class (collectively, the `Releasing Parties') irrevocably and unconditionally release the Plan, the Trustees; any former Trustees; any other fiduciary of the Plan; the TCU and its subordinate bodies; and all of their officers, agents, representatives, heirs, administrators, executors, directors, employees, attorneys, successors, and assigns (collectively, the `Released Parties'), from any and all demands, causes of action, fees, and liabilities of any kind whatsoever in law, by statute, or in equity, whether known or hereafter discovered and whether nor or hereafter fully, partially, or not disclosed to the Releasing Parties, which the Releasing Parties ever had, now have, or hereafter can, shall, or may have against the Released Parties concerning the 1991 COLA Amendment and any and all actions and recommendations taken up

through the effective date of this Agreement concerning the 1991 COLA Amendment or directly related to its effects, excepting only the obligations undertaken in this Agreement (`Released Claims').

"7. The Releasing Parties acknowledge that they may hereafter discover claims relating to the 1991 COLA Amendment that are presently unknown or unsuspected or facts in addition to or different from those now known about the 1991 COLA Amendment. Nevertheless, the Releasing Parties by this Agreement release fully, finally and forever all matters released herein.

"8. The Releasing Parties and any person acting on behalf of one or more Releasing Parties shall not file any lawsuit or other action asserting a Released Claim nor benefit from any lawsuit or other action asserting such a Released Claim.

Such overbroad terms are both contrary to the public interest and violative of petitioners' First Amendment rights in view of amendments to the ADEA under the Older Workers' Protection Act which specifically provides that "an individual may not waive any right or claim under the Act unless the waiver is knowing and voluntary." (29 U.S.C. § 626(f)(1), quoted in Pet.App. at A-44-6.)

Moreover, any such waiver must be set forth in "an agreement between the individual and the employer," (emphasis added), under 29 U.S.C. § 626(f)(A) which the Settlement Agreement is not. (Pet.App. A-45)

The statute also provides that in any dispute as to whether the waiver was "knowing and voluntary," such as the release in the settlement agreement, "the party asserting the

validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2)," (29 U.S.C. § 626(f)(3), emphasis added, Pet. App. A-46.)

The injunction's effect of purporting to divest the district court in the Southern District of New York, which is the only "court of competent jurisdiction" to determine the validity of the waiver or release of such claims, therefore is unlawful under both the ADEA and the All Writs Act, and also violative of both the First Amendment and Seventh Amendment rights of the petitioners.

The right to trial by jury under the Seventh Amendment is made specifically applicable by the Age Discrimination in Employment Act at 29 U.S.C. § 626(c)(2), which is quoted in the Appendix at A-44.

This important constitutional right is not available to the retirees in the Baltimore litigation because it was brought solely under ERISA, which contains no such jury trial rights, a factor which reinforces the conclusion that under the statutory framework established by Congress the distr court in New York but not in Maryland must be regarded as the "court of competent jurisdiction."

The wreckage caused to the package of the retirement benefits of the elderly retirees, including the charges imposed on their health insurance benefit and the elimination of the COLA, as calculated by Mr. Devlin, was to reduce them by 64% or more.

This devastating economic effect upon their total retirement benefits was all the result of unilateral action by the TCU, their former employer but, as noted above, the TCU is not even a party in the Baltimore litigation.

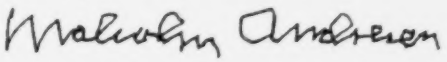
Due process and equal protection principles therefore require invalidation of the provisions in the injunction spawned by the Settlement Agreement and Release that prohibit the petitioners from proceeding against the real culprit in the court that has jurisdiction over it, and its fiduciaries, are invalid under the All Writs Act as well as the First Amendment because it is the petitioners who are the victims of irreparable injury, not the TCU perpetrator of the discriminatory and retaliatory acts that enhanced its treasury so spectacularly that its Chief Financial Officer now brags that the financial strength of the TCU is the best in its history and admission against interest that Mr. Devlin has exposed in the case pending on appeal in the Southern District of New York. (Devlin Aff. ¶ 7)

In the circumstances presented, therefore, it is submitted that the question of whether the injunction issued by the Baltimore court is required to be vacated under the principles established by *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Hansberry v. Lee*, 311 U.S. 32 (1940), in which similar court orders were reversed, is of very great importance for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ Of Certiorari should be granted.

Respectfully submitted,



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October 27, 2003

No._____

In The Supreme Court of the United States

ROBERT J. DEVLIN, RETIRED EMPLOYEES PROTECTIVE ASSOCIATION and FREDERICK RINCKWITZ, individually and as representatives of all members of the class,

Petitioners,

v.

ROBERT A. SCARDELLETTI; FRANK FERLIN, JR.; JOEL PARKER; DON BUJOLD, as Trustees of the Transportation Communications International Union Staff Retirement Plan, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed July 29, 2003

ROBERT A. SCARDELLETTI; FRANK FERLIN, JR.; JOEL PARKER; DON BUJOLD, as Trustees of the Transportation Communications International Union Staff Retirement Plan,
Plaintiffs-Appellees,

v.

FREDERICK RINCKWITZ, individually and as representative of all of the members of the class,
Defendant-Appellant,

GEORGE THOMAS DEBARR, No. 02-1013

Individually and as representative of a class of all persons similarly situated; ANTHONY SANTORO, SR.,
Defendants-Appellees,

THOMAS J. HEWSON,
Party in Interest-Appellant,

and

DONALD A. BOBO; R. I. KILROY; F. T. LYNCH; FRANK MAZUR; ANDREW HAGAN,
Defendants,

v.

ROBERT J. DEVLIN; RETIRED EMPLOYEES PROTECTIVE ASSOCIATION,
Movants-Appellants,

and

A. MEADERS; JAMES H. GROSKOPF; THOMAS C. ROBINSON; DOYLE W. BEAT; MIRIAM E. PARRISH; ROBERT A. PARRISH; DESMOND FRASER; JAMES L. BAILEY, DOROTHY DEERWESTER; CLAY B. WOLFE; KENNETH B. LANE; BRIAN A. JONES; CHARLES O. SWASY,
Parties in Interest.

On Petition for Rehearing and Rehearings En Banc

The appellants' filed a motion for leave to file an amended petition for rehearing and rehearing en banc.

The Court grants the motion.

The appellants' petition for rehearing and rehearing en banc and amended petition for rehearing and rehearing en banc were submitted to this court. As no member of this Court or the panel requested a poll on the petitions for rehearing en banc, and

As the panel considered the petitions for rehearing and are of the opinion that they should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc and amended petition for rehearing and rehearing en banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT A. SCARDELLETTI; FRANK FERLIN, JR.; JOEL PARKER; DON BUJOLD, as Trustees of the Transportation Communications International Union Staff Retirement Plan,
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Defendants,

v.

ROBERT J. DEVLIN; RETIRED EMPLOYEES PROTECTIVE ASSOCIATION,
Movants-Appellants,

and

A. MEADERS; JAMES H. GROSKOPF; THOMAS C. ROBINSON; DOYLE W. BEAT; MIRIAM E. PARRISH; ROBERT A. PARRISH; DESMOND FRASER; JAMES L. BAILEY, DOROTHY DEERWESTER; CLAY B. WOLFE; KENNETH B. LANE; BRIAN A. JONES; CHARLES O. SWASY,
Parties in Interest.

Appeal from the United States District Court

for the District of Maryland, at Baltimore.

J. Frederick Motz, District Judge.

(CA-97-3464-JFM)

Argued: May 9, 2003

Decided: July 3, 2003

Before WILLIAMS, MICHAEL, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Arthur McKee Wisehart, WISEHART & KOCH, New York, New York, for Appellants. Carmen Rose Parcelli, GUERRIERI, EDMOND & CLAYMAN, P.C., Washington, D.C., for Appellees. **ON BRIEF:** John A. Edmond, Jeffrey A. Bartos, GUERRIERI, EDMOND & CLAYMAN, P.C., Washington, D.C.; William F. Hanrahan, Lonie Anne Hassel, GROOM LAW GROUP, CHARTERED, Washington, D.C.; Barbara Kraft, BEINS, BODLEY, AXELROD & KRAFT, Washington, D.C.; Kenneth M. Johnson, TUGGLE, DUGGINS & MESCHAN, P.A., Greensboro, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Robert J. Devlin appeals from the district court's order enjoining him from pursuing litigation in other courts collaterally attacking the settlement of this class action. Devlin contends that the district court's injunction fails to satisfy the requirements of the All Writs Act, 28 U.S.C. § 1651(a), and Fed. R. Civ. P. 65(d). We find no error in the district court's resolution of this matter, and we affirm.

I.

This dispute arose in the fall of 1997, when the trustees of the Transportation Communications International Union amended the union's Staff Retirement Plan (the "Plan") to

rescind a 1991 cost-of-living adjustment (the "1991 COLA") in its entirety.[1] The 1991COLA increased participants' pensions by an amount equal to the increase in the COLA index for every three years following a participant's retirement.

The trustees — who were elected after the 1991 COLA was enacted — later learned that the decision to enact the 1991 COLA was based upon an incorrect valuation of the Plan's liabilities. (The 1991 COLA increased the Plan's liabilities by about $20 million.) Rather than rescinding the 1991 COLA outright, the trustees amended the Plan to freeze the COLA with respect to active employees only; thus, the 1991 COLA remained in place for participants who had already retired when the COLA took effect.

The trustees sued their predecessors for breach of fiduciary duty and sought a declaration that the 1991 COLA was void. The district court ruled in favor of the trustees and declared that the 1991 COLA was void as to all retirees, including pre-1991 retirees. With this ruling in hand, the trustees amended the Plan again in 1997 to rescind the 1991 COLA in its entirety.

The trustees promptly filed this class action in an attempt to forestall likely challenges to the rescission of the 1991 COLA. The trustees sought a declaration that the 1997 rescission of the 1991 COLA was appropriate and binding on all Plan participants or, alternatively, that the 1991 COLA was void as to all Plan participants. Although Devlin — who was retired when the 1991 COLA took effect — was initially named as a representative for the Retiree Subclass, he declined to accept the position. Another class representative was substituted for Devlin.

---

[1] A more complete statement of the facts underlying this dispute may be found in *Scardelletti v. DeBarr*, 265 F.3d 195 (4th Cir. 2001) (*Scardelletti I*), *rev'd on other grounds sub nom. Devlin v. Scardelletti*, 536U.S. 1 (2002).

In May 1999, the trustees and the named defendants reached a settlement that called for the district court to enter a consent order declaring the 1991 COLA void from its inception. The settlement also provided for a release of all claims "concerning the 1991 COLA Amendment and any and all actions and recommendations taken up through the effective date of [the settlement] concerning the 1991 COLA Amendment or directly related to its effects." In addition, the settlement provided that any disputes concerning the settlement were subject to the exclusive jurisdiction of the United States District Court for the District of Maryland.

After the parties reached this settlement, Devlin moved to intervene in the case. The motion was denied as untimely. Nevertheless, the district court heard Devlin's objections to the settlement at a fairness hearing conducted in November 1999. The court rejected Devlin's arguments and approved the settlement.

The district court's approval of the settlement did not deter Devlin from pursuing similar litigation in the Southern District of New York. Back in 1995 — while the trustees' initial lawsuit against their predecessors was pending in the district court — Devlin filed two lawsuits in the United States District Court for the Southern District of New York relating to death benefits and medical benefits under the Plan. *See Devlin v. Transportation Communications Int'l Union*, No. 95 Civ. 0742 (S.D.N.Y. 1995) ("*Devlin I*"); *Devlin v. Transportation Communications Int'l Union*, No. 95 Civ. 10838 ("*Devlin II*") (S.D.N.Y. 1995). These cases were later consolidated in the Southern District of New York.

Significantly, *Devlin II* included a claim that the trustees' then-intention to rescind the 1991 COLA was motivated by discriminatory animus against retirees. Once the trustees enacted the 1997 amendment rescinding the COLA in its entirety, Devlin moved in *Devlin II* for a preliminary injunction to restore the COLA. The Southern District of New York denied this request, and the Second Circuit affirmed. *Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121,

131-32 (2d Cir. 1999). According to the Second Circuit, "The exact COLA issue that [Devlin is] pursuing in *Devlin II* is being addressed by the district court in Maryland. . . . It seems eminently sensible that the Maryland district court should resolve fully the COLA amendment issue, given that that court already ruled that the amendment could be repealed as to those who retired prior to 1991, and that court is already entertaining a suit in which the legality of such a repeal is at issue." *Id.* at 132.

On remand from the Second Circuit (certain non-COLA issues were sent back to the Southern District of New York), Devlin filed an amended complaint in the consolidated cases to assert the very same COLA claims that were previously rejected. Devlin's new complaint sought a declaration that "the automatic Cost of Living Adjustment for the Retirement Plan must be retained," as well as restitution for "[a]ll Cost of Living Adjustments withheld." He requested that the court adopt findings that "the entire proceeding in Maryland" had been "tainted." The Southern District of New York denied Devlin's motion for leave to amend his complaint.

After the Maryland district court approved the settlement in this case, Devlin filed his third lawsuit in the Southern District of New York. *Devlin v. Scardelletti*, No. 00 Civ. 0043 (S.D.N.Y. 1999) ("*Devlin III*"). The complaint in *Devlin III* alleged that the trustees' prosecution of this action in Maryland amounted to a breach of fiduciary duty and that the settlement was procured by collusion. Devlin sought declaratory relief and compensatory damages relating to the rescission of the 1991 COLA.

In response to the filing of *Devlin III*, the trustees moved the Maryland district court for an injunction under the All Writs Act to stop Devlin's continued attacks on the settlement. The district court initially granted the motion in March 2000, ordering Devlin to dismiss Devlin III and enjoining him "from making any filing in any forum against any person, including counsel in this case or their law firms, that raises issues encompassed within the settlement of this action or that directly

or collaterally attacks the settlement of this matter, except in this Court or on appeal from Orders of this Court."

Devlin appealed to this Court, challenging the district court's (1) denial of his motion to intervene, (2) approval of the settlement, and (3) entry of the All Writs Act injunction. We affirmed the district court's denial of the motion to intervene as untimely, and we further held that Devlin lacked standing to challenge the fairness of the settlement. *Scardelletti I*, 265 F.3d at 202-10.[2] With respect to the All Writs Act injunction, we rejected Devlin's assertion that he had been denied access to the courts. *Id.* at 213 n.21. Nevertheless, we concluded that the district court's injunction failed to comply with the requirement in Rule 65 that an order granting an injunction must state the reasons for issuance of the injunction. *Id.* at 212-13. Although we were "reluctant" to impose any unnecessary burden on the district court's ability to protect its judgment from collateral attack, we remanded the case for "clarification" as to the reasons supporting the injunction.

On remand, the district court gave the parties another opportunity to be heard on the injunction issue. The trustees filed a memorandum in support of the injunction, incorporating by reference the evidentiary materials they filed in support of the first injunction. Devlin responded by filing an affidavit with exhibits. After considering these additional materials, the district court reissued its All Writs Act injunction in November 2001, explaining its reasons as follows:

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[2] The Supreme Court of the United States granted a writ of certiorari on the standing issue and held that an absent class member who objects to a settlement prior to its approval may appeal from the judgment approving that settlement. *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002). On remand, we considered Devlin's objections to the settlement on their merits and affirmed the district court's approval of the settlement. *Scardelletti v. DeBarr*, 43 Fed. Appx. 525, 528-29 (4th Cir. 2002) (unpublished) (*Scardelletti II*).

The reason for my issuance of the injunction is that Robert Devlin has, by his pattern of conduct, demonstrated that unless he is enjoined, he will institute litigation in other districts to undermine the class action settlement this court has approved (a ruling that has been affirmed by the Fourth Circuit). This pattern is evidenced by other cases that Devlin filed both before and after the settlement agreement was approved while this action was pending. After [the court] ordered rescission of the 1991 COLA, Devlin filed two actions in the Southern District of New York, seeking a preliminary injunction to restore the COLA. . . . Thereafter, Devlin sought to amend his complaint in the New York actions to reassert the same COLA claims previously raised and rejected. . . .

Notwithstanding my approval of the settlement agreement, while the approval was pending, Devlin instituted another action in the Southern District of New York alleging that the prosecution of the present suit by the Trustees was a breach of their fiduciary duties and that the settlement of this litigation was the product of collusion. Self-evidently, the institution of that action constituted an attack upon my approval of the settlement agreement and was an attempt to circumvent the jurisdiction not only of this court but also of the Fourth Circuit in which the appeal of my rulings was to be heard.

It was against the background of these lawsuits that on March 15, 2000, I entered an injunction requiring Devlin to dismiss the breach of fiduciary [duty] complaint in the Southern District of New York. Even then, Devlin did not comply with the injunction but instead moved for reconsideration of the Southern District's decision in the original New York actions denying leave to file an amended complaint. . . .

> . . . Here, Devlin's actions clearly were an attempt to relitigate issues I had decided and to collaterally attack my rulings, including my approval of the settlement agreement. Nothing short of an injunction (and, as it turned out, the threat of the imposition of contempt sanctions) deterred him from his conduct. Moreover, he suffered no cognizable harm as the result of the issuance of the injunction since . . . this court is the only appropriate forum for him to challenge, directly or indirectly, the class action settlement agreement.

This appeal followed.

II.

We review the district court's entry of an injunction under the All Writs Act for an abuse of discretion. *Scardelletti I*, 265 F.3d at 210; In re March, 988 F.2d 498, 500 (4th Cir. 1993). Devlin challenges both the propriety of an injunction under the Act and the form of the injunction under Fed. R. Civ. P. 65. We find the district court's injunction sufficient in both respects.

A.

The All Writs Act authorizes a federal court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act empowers a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40 (1985) (internal quotations omitted). We have previously noted that a district court may, consistent with the Act, "enjoin parties before it from

attempting to relitigate decided issues and to prevent collateral attack of its judgments." *In re March*, 988 F.2d at 500.[3]

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[3] Contrary to Devlin's contention on appeal, this All Writs Act injunction is not subject to the four-factor balancing test ordinarily applicable to preliminary injunctions. *Cf. Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 196 (4th Cir. 1977) (stating that "the trial court standard for interlocutory injunctive relief is the balance-of-hardship test"). In the prior appeal, we characterized the district court's injunction as a permanent injunction, not a preliminary injunction. *Scardelletti I*, 265 F.3d at 211 n.19.

Indeed, there is nothing preliminary about the district court's order at all. A permanent injunction is proper if it is necessary to protect the court's judgment against likely collateral attack. *See In re American Honda Motor Co., Inc. Dealerships Relations Litig.*, 315 F.3d 417, 437-38 (4th Cir. 2003); *In re March*, 988 F.2d at 500.

Devlin's contention that the district court failed to give him a hearing before entering the injunction is meritless. Assuming that Devlin adequately presented this issue on appeal, the record plainly shows that the district court accepted briefs and evidentiary submissions and conducted a live hearing before entering the first All Writs Act injunction. On remand — with the instruction from this Court merely to state its reasons for entering the injunction — the district court invited additional briefing and accepted yet another affidavit from Devlin. In compliance with this Court's mandate in the earlier appeal, the district court stated its reasons for issuing the injunction. It is clear from the record that Devlin was heard on the issue. In reaching this conclusion, we have considered the supplemental materials filed by both parties in response to questions raised at oral argument.

This case presents a situation similar to that in *In re American Honda Motor Company, Inc. Dealerships Relations Litigation*, 315 F.3d 417 (4th Cir. 2003). The district court in that case entered an injunction forbidding the plaintiffs from enforcing a favorable arbitration award, where that award resulted from the plaintiffs' arguing to the arbitrator that they had not been compensated adequately by a settlement earlier approved by the district court. *Id.* at 438. Because this argument required the arbitrator to interpret the district court's settlement order, we held that an injunction was "necessary to prevent direct frustration of the district court's Settlement Approval Order." *Id.*[4]

The district court explained that the injunction at issue in this case was necessary because Devlin was continuing to attack the court's order approving the settlement of claims involving COLA benefits under the Plan. After the district court approved the settlement at the close of the fairness hearing, Devlin (1) filed a motion to reconsider the denial of his motion for leave to file an amended complaint in the consolidated cases pending in the Southern District of New York and (2) commenced a new lawsuit in the Southern District of New York alleging that prosecution of this case constituted a breach of fiduciary duty and that the settlement was procured by collusion. These actions, according to the district court, "were clearly an attempt to relitigate issues" that it had already decided.

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[4] We also found that the injunction was proper "to cure the injustices created by the [plaintiffs] through their abuse of the MDL process," but this conclusion plainly constituted an additional ground for approval of the injunction. 315 F.3d at 439. A finding of misconduct was not, as Devlin argues, a necessary condition for affirmance. We need not express an opinion whether Devlin's repeated attacks on a class action settlement amounts to misconduct that would warrant issuance of an injunction.

It remains clear that "Devlin was seeking to undermine the district court's approval of the class settlement." *Scardelletti I*, 265 F.3d at 212. The district court heard Devlin's objections to the settlement at the fairness hearing, and this Court heard his objections on appeal. We affirmed the district court's approval of the settlement, and Devlin is bound by that judgment. *See Devlin*, 536 U.S. at 10 (stating that "nonnamed class members are parties to the proceedings in the sense of being bound by the settlement"). Devlin's repeated attempts to "end run, at the last minute, the district court's judgment" approving the settlement in this case provided ample justification for issuance of an All Writs Act injunction. *In re March*, 988 F.2d at 500.[5]

B.

Devlin also argues that the injunction should be set aside because its description of the forbidden conduct is vague and ambiguous. The district court's order states that Devlin is "enjoined from making any filing in any forum against any person, including counsel in this case or their law firms, that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court."

The specificity requirement of Rule 65(d) serves two important purposes: (1) to give parties subject to the injunction proper notice of the prohibited conduct and (2) to facilitate meaningful appellate review. *Schmidt v. Lessard*, 414 U.S. 473, 476-77 (1974); *CAC Intel, Inc. v. Skippy, Inc.*, 214 F.3d 456, 459 (4th Cir. 2000). To be sure, the specificity requirement is "mandatory and must be observed in every instance." *Scardelletti I*, 265 F.3d at 211. Yet "[t]he mere fact that . . .

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[5] Devlin's reliance upon *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), and *Clinton v. Goldsmith*, 526 U.S. 529 (1999), is misplaced. While these cases establish that the All Writs Act does not itself confer subject matter jurisdiction, there is no question that the district court had jurisdiction to adjudicate the class action at issue here. The All Writs Act merely authorized the district court to enter an order to protect a judgment it had entered in a case over which it already had jurisdiction under 28 U.S.C. § 1331.

interpretation is necessary does not render the injunction so vague and ambiguous that a party cannot know what is expected of him." *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States of Am. Co.*, 195 F.3d 765, 771 (5th Cir. 1999) (internal quotations omitted).

We conclude that the language of the district court's injunction was sufficiently specific both to put Devlin on notice that he may not continue to pursue litigation outside the district court concerning matters already resolved in this case and to allow this Court an opportunity for meaningful review. *See Schmidt*, 414 U.S. at 476-77; *CAC Intel, Inc.*, 214 F.3d at 459. Other courts have approved similar restrictions on relitigation. *See, e.g., Feltner v. Title Search Co.*, 283 F.3d 838, 841-42 (7th Cir. 2002) (affirming entry of a contempt order against a party who violated an injunction forbidding that party from "relitigating in the related state-court action" certain issues raised in the state-court complaint because the district court had already decided those issues); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524-26 (9th Cir. 1983) (approving an order enjoining the plaintiff from "relitigating, or attempting to relitigate . . . the factual and legal issues adjudicated and dismissed" in the pending case). The district court's injunction satisfies the specificity requirement of Rule 65.[6]

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[6] Devlin's constitutional claims are meritless. First, Devlin argues that the injunction violates his First Amendment rights to free speech and access to courts. As we noted in the prior appeal, "the injunction explicitly leaves Devlin the option of pursuing an action in the District of Maryland, and he is not precluded from litigating in any court any matter not connected with this litigation." *Scardelletti I*, 265 F.3d at 213 n.21. The district court's limitation on the scope of its injunction preserves Devlin's First Amendment rights. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996); *Bounds v. Smith*, 430 U.S. 817, 823 (1977).

III.

The district court necessarily determined that Devlin and other class members were adequately represented by the named class representatives. Those representatives obtained a settlement for the class that the district court and this Court deemed fair and reasonable. Devlin is bound by that settlement, and the district court properly entered an injunction under the All Writs Act to protect it from repeated attack. The judgment of the district court is

AFFIRMED.

Second, Devlin argues that he has been deprived of due process. Devlin's due process arguments focus on the procedures surrounding the approval of the settlement, not the issuance of this injunction. Specifically, Devlin contends that he was deprived of due process when he was denied leave to intervene and when the district court approved a settlement that he claimed was the product of collusion among the named parties. We heard Devlin's objections to the settlement once before, and we rejected them on their merits. *Scardelletti II*, 43 Fed. Appx. at 528-29; Scardelletti I, 265 F.3d at 202-04. To the extent that Devlin claims a violation of due process concerning the adequacy of the district court's hearings on this matter or the language of the injunction itself, we reject these claims for the reasons stated above.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ROBERT A. SCARDELLETTI; FRANK FERLIN, JR.; JOEL PARKER; DON BUJOLD, as Trustees of the Transportation Communications International Union Staff Retirement Plan,
Plaintiffs-Appellees,

v.

GEORGE THOMAS DEBARR, Individually and as representative of a class of all persons similarly situated; ANTHONY SANTORO, SR.,
Defendants-Appellees,

and

DONALD A. BOBO; R. I. KILROY; F. T. LYNCH; FRANK MAZUR,
Defendants,

No. 99-2619

v.

ROBERT J. DEVLIN; RETIRED EMPLOYEES PROTECTIVE ASSOCIATION,
Movants-Appellants,

and

A. MEADERS; JAMES H. GROSKOPF; THOMAS C. ROBINSON; DOYLE W. BEAT; MIRIAM E. PARRISH; ROBERT A. PARRISH; DESMOND FRASER; JAMES L. BAILEY; DOROTHY DEERWESTER; THOMAS J. HEWSON; CLAY B. WOLFE; KENNETH B. LANE; BRIAN A. JONES; CHARLES O. SWASY,
Parties in Interest.

ROBERT A. SCARDELLETTI; FRANK FERLIN, JR.; JOEL PARKER; DON BUJOLD, as Trustees of the Transportation Communications International Union Staff Retirement Plan,
Plaintiffs-Appellees,

v.

GEORGE THOMAS DEBARR, Individually and as representative of a class of all persons similarly situated; ANTHONY SANTORO, SR.,
Defendants-Appellees,

and

DONALD A. BOBO; R. I. KILROY; F. T. LYNCH; FRANK MAZUR,
Defendants,

No. 00-1411

v.

ROBERT J. DEVLIN; RETIRED EMPLOYEES PROTECTIVE ASSOCIATION,
Movants-Appellants,

and

A. MEADERS; JAMES H. GROSKOPF; THOMAS C. ROBINSON; DOYLE W. BEAT; MIRIAM E. PARRISH; ROBERT A. PARRISH; DESMOND FRASER; JAMES L. BAILEY; DOROTHY DEERWESTER; THOMAS J. HEWSON; CLAY B. WOLFE; KENNETH B. LANE; BRIAN A. JONES; CHARLES O. SWASY,
Parties in Interest.

ROBERT A. SCARDELLETTI; FRANK FERLIN, JR.; JOEL PARKER; DON BUJOLD, as Trustees of the Transportation Communications International Union Staff Retirement Plan,
Plaintiffs-Appellees,

v.

GEORGE THOMAS DEBARR, Individually and as representative of a class of all persons similarly situated; ANTHONY SANTORO, SR.,
Defendants-Appellees,

and

DONALD A. BOBO; R. I. KILROY; F. T. LYNCH; FRANK MAZUR,
Defendants,

No. 00-1525

v.

ROBERT J. DEVLIN; RETIRED EMPLOYEES PROTECTIVE ASSOCIATION,
Movants-Appellants,

and

A. MEADERS; JAMES H. GROSKOPF; THOMAS C. ROBINSON; DOYLE W. BEAT; MIRIAM E. PARRISH; ROBERT A. PARRISH; DESMOND FRASER; JAMES L. BAILEY; DOROTHY DEERWESTER; THOMAS J. HEWSON; CLAY B. WOLFE; KENNETH B. LANE; BRIAN A. JONES; CHARLES O. SWASY,
Parties in Interest.

On Remand from the United States Supreme Court.

(S. Ct. No. 01-417)

Decided on Remand: August 8, 2002

Before WILLIAMS and MICHAEL, Circuit Judges, and Joseph F. ANDERSON, Jr., Chief United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Arthur McKee Wisehart, WISEHART & KOCH, New York, New York, for Appellants. William Francis Hanrahan, GROOM LAW GROUP, CHARTERED, Washington, D.C.; Barbara J. Kraft, BEINS, AXELROD & KRAFT, P.C., Washington, D.C.; Kenneth M. Johnson, TUGGLE, DUGGINS & MESCHAN, P.A., Greensboro, North Carolina, for Appellees. **ON BRIEF:** KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland, for Appellants. Leonie Hassel, GROOM LAW GROUP, CHARTERED, Washington, D.C., for Appellees Scardelletti, et al.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

In this case, appellant Robert Devlin seeks to challenge a class action settlement in the United States District Court for the District of Maryland. Previously, we held that the district court did not abuse its discretion in denying Devlin leave to intervene, that Devlin could not appeal the district court's approval of the settlement because he was not a party to the district court litigation, and that the district court was required to explain, pursuant to Federal Rule of Civil Procedure 65, its reasons for granting an injunction under the All Writs Act, 28 U.S.C.A. § 1651(a) (West 1994). *Scardelletti v. Debarr*, 265 F.3d 195, 213 (4th Cir. 2001), *rev'd sub nom. Devlin v. Scardelletti*, ___ U.S. ___, 122 S. Ct. 2005 (2002); *id.* at 216 (Michael, J., concurring in part and concurring in the judgment) (concluding that Devlin could appeal the district court's settlement approval but rejecting his challenges on the merits). The Supreme Court reversed and remanded, holding that "nonnamed class members like [Devlin] who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." *Devlin v. Scardelletti*, 122 S. Ct. 2005, 2013 (2002). The Supreme Court did not disturb our affirmance of the district court's denial of intervention or our reversal and remand of the district court's All Writs Act injunction. *Id.* Devlin has separately appealed the district court's renewed entry of an All Writs Act injunction, and that separate appeal is not at issue here. Instead, in this appeal, we must determine the merits of Devlin's challenges to the district court's approval of the settlement.[1]

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[1] Because the merits of Devlin's challenges to the settlement have already been fully briefed and argued, we need not obtain additional briefing to decide this appeal.

I.

The underlying facts of this dispute are adequately stated in our and the Supreme Court's prior opinions in this case. *Scardelletti v. Debarr*, 265 F.3d 195, 212 (4th Cir. 2001), *rev'd sub nom. Devlin v. Scardelletti*, ___ U.S. ___, 122 S. Ct. 2005 (2002). Devlin's basic substantive objection to the settlement is that it nullifies a 1991 amendment to the pension plan which granted a substantial cost-of-living adjustment (COLA) to employees who retired prior to 1991. Devlin argues that the district court erred in approving the proposed settlement because it discriminates against retirees in favor of active participants, lacks an opt-out provision, is the product of conflicts of interest on the part of class representatives and the pension plan trustee, and is based on false claims of financial necessity. Devlin asserts that the district court should have allowed discovery and heard evidence that would have developed his allegations of conflicts of interest. Devlin also contends that COLA benefits for pre-1991 retirees constitute accrued benefits, the modification of which is subject to various procedural requirements imposed by the Employee Retirement Income Security Act (ERISA), and thus, that the settlement is invalid because it violates ERISA. 29 U.S.C.A. § 1054(g)(1) (West 1999 & Supp. 2002).

We review a district court's approval of a proposed class action settlement to "determine whether there [is] a clear showing that the district court abused its discretion" in approving the settlement. *Kovacs v. Ernst & Young*, 927 F.2d 155, 158 (4th Cir. 1991) (internal quotation marks omitted). Federal Rule of Civil Procedure 23(e), which provides that "a class action shall not be dismissed without the approval of the court," contemplates a judicial inquiry into the fairness and adequacy of the proposed settlement. *Kovacs*, 927 F.3d at 158. In determining whether a settlement is fair, the district court should examine "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that has

been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel" in the relevant area of class action litigation. *Id.* at 159. In determining whether a settlement is adequate, a district court should consider "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement."[2] *Id.*

The district court's opinion demonstrates that it carefully applied the *Kovacs* factors and gave close consideration to Devlin's contentions. The district court found, with adequate support, that the restoration of the COLA for pre-1991 retirees would threaten the stability and solvency of the retirement plan, thereby damaging all plan beneficiaries. *See Debarr*, 265 F.3d at 216 (Michael, J., concurring in part and concurring in the judgment) (noting the district court's reasonable conclusion that Devlin's position would "steer the ship onto the rocks" and was "absolutely destructive of everybody's rights and interests"). The district court also reasonably found that there was a strong risk on the part of the defendant classes that they would lose on the merits if the case were litigated to final judgment, because the same district court earlier had determined that the COLA benefits were not accrued benefits for pre-1991 retirees and that the trustees who granted the COLA had done so in breach of their fiduciary duties. *Scardelletti v. Bobo*, No. JFM-95-52 (D. Md. Sept. 8, 1997). The record demonstrates that the district

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[2] In addition, any award of attorney's fees to class counsel must be reasonable in comparison to the benefits conferred on the class through counsel's efforts. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002). Devlin does not challenge the settlement on this basis.

court was adequately informed as to the factual basis for Devlin's conflict of interest and inadequate representation claims and did not abuse its discretion in declining to allow Devlin discovery on those claims. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) ("[I]t is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision"); *see also Debarr*, 265 F.3d at 204 n.10 (finding the district court's decision not to allow Devlin discovery to have been reasonable). Further, Devlin cannot show that, by authorizing elimination of the COLA, the settlement "authorizes the continuation of clearly illegal conduct" under ERISA, such that its approval by the district court was improper. *Isby v. Bayh*, 75 F.3d 1191, 1197 (7th Cir. 1996) (internal quotation marks omitted).

II.

In conclusion, Devlin's challenges to the district court's approval of the settlement fail. The district court carefully weighed all relevant considerations and did not abuse its discretion in approving the settlement in this case. Accordingly, we affirm the district court's approval of the settlement.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.A. SCARDELLETTI, ET AL. *
*
v. * Civil No. JFM-97-3464
*
ANTHONY SANTORO, SR., ET AL. *

*****

ORDER GRANTING PRELIMINARY INJUNCTION

This matter came before the Court on the motion of Plaintiff Trustees for a preliminary injunction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). For the reasons stated in the accompanying memorandum, it is hereby

ORDERED, that the motion is GRANTED; and it is further

ORDERED, that Devlin, Hagan, Hewson, Rinckwitz, and REPA, as well as all members of the defendant class, are enjoined from making any filing in any forum against any person, including counsel in this case or their law firms, that raises issues encompassed within the settlement of this action or that directly or collaterally attacks the settlement of this matter, except in this Court or on appeal from the Orders of this Court.

IT IS SO ORDERED, this 20th day of November 2001.

/s/

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

R.A. SCARDELLETTI, ET AL. *
*
v. * Civil No. JFM-97-3464
*
ANTHONY SANTORO, SR., ET AL. *
*****

MEMORANDUM

The Fourth Circuit has remanded this action for the sole purpose of having me set forth my reasons for issuing an injunction under the All Writs Act in accordance with Fed. R. Civ. P. 65.

The reason for my issuance of the injunction is that Robert Devlin has, by his pattern of conduct, demonstrated that unless he is enjoined, he will institute litigation in other districts to undermine the class action settlement this court has approved (a ruling that has now been affirmed by the Fourth Circuit).[1] This pattern is evidenced by other cases that Devlin filed both before and after the settlement agreement was approved while this action was pending. After ordered recision of the 1991 COLA, Devlin filed two actions in the Southern District of New York, seeking a preliminary injunction to restore the COLA. The New York court denied the motion, finding that this court was the proper forum in which such a motion should be filed. The Second Circuit affirmed. Thereafter, Devlin sought to amend his complaint in the New York actions to reassert the same COLA claims previously raised and rejected. In the proposed amended complaint Devlin claimed that "the entire proceeding in Maryland" had been

[1]Devlin has been joined in the litigation he has instituted by other members of the retiree subclass. I will refer to this group collectively as "Devlin."

"tainted." The New York court denied the motion for leave to amend.

After this court had granted preliminary approval to the settlement agreement, Devlin sought to intervene. I denied the motion to intervene as untimely but Devlin and his counsel did attend the fairness hearing. Devlin appealed my denial of his motion to intervene and my approval of the settlement agreement. My rulings were affirmed by the Fourth Circuit on appeal.

Notwithstanding my approval of the settlement agreement, while the approval was pending, Devlin instituted another action in the Southern District of New York alleging that the prosecution of the present suit by the Trustees was a breach of their fiduciary duties and that the settlement of this litigation was the product of collusion. Self-evidently, the institution of that action constituted an attack upon my approval of the settlement agreement and was an attempt to circumvent the jurisdiction not only of this court but also of the Fourth Circuit in which the appeal of my rulings was to be heard.

It was against the background of these lawsuits that on March 15, 2000, I entered an injunction requiring Devlin to dismiss the breach of fiduciary complaint in the Southern District of New York. Even then, Devlin did not comply with the injunction but instead moved for reconsideration of the Southern District's decision in the original New York actions denying leave to file an amended complaint. Only after I advised Devlin that his failure to comply with my injunction would subject him to contempt did he withdraw the breach of fiduciary complaint and his motion for reconsideration in the original actions.

"The All Writs Act empowers a federal court to enjoin parties before it from attempting to relitigate decided issues and to prevent collateral attack of its judgments." In re March, 988 F.2d 498, 500 (4th Cir. 1993); see also United States v. Cohen, 152 F.3d 321, 325 (4th Cir. 1998)

("where an injunction is proper in order to protect or effectuate the judgments of a federal court, it is within that court's power to issue the injunction under the All Writs Act."). Here, Devlin's actions clearly were an attempt to relitigate issues I had decided and to collaterally attack my rulings, including my approval of the settlement agreement. Nothing short of an injunction (and, as it turned out, the threat of the imposition of contempt sanctions) deterred him from his conduct. Moreover, he has suffered no cognizable harm as the result of the issuance of the injunction since, as both the United States District Court for the Southern District of New York and the Second Circuit have recognized, this court is the only appropriate forum for him to challenge, directly or indirectly, the class action settlement agreement.

A separate order re-issuing the March 15, 2000 injunction is being entered herewith.[2]

Date: Nov. 20, 2001

J. Frederick Motz
United States District Judge

[2] The preliminary injunction I entered on March 15, 2000 required that Messrs. Devlin, Hagan, Hewson, Rinckwitz, and REPA were enjoined to dismiss their breach of fiduciary complaint in the Southern District of New York. In light of the fact that that action has now been dismissed, the accompanying preliminary injunction order deletes that clause.

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into by and among the plaintiffs and the Defendant Class (collectively, the "Parties") in the action styled *Scardelletti v. Santoro*, Civil Action No. JFM-97-3464 (D. Md.) (the "Action").

WHEREAS, R. A. Scardelletti, Howard Randolph, and Joel Parker ("Trustees"), or their predecessors in office, as trustees of the Transportation Communications International Union Staff Retirement Plan ("Plan") brought the Action against the Defendant Class to obtain equitable relief to protect the Plan; and

WHEREAS, the Defendant Class is made up of all active, terminated vested and retired participants in the Plan and their beneficiaries, except R. A. Scardelletti, Frank Ferlin, Jr., Joel Parker, Don Bujold, Howard Randolph, Mitchell M. Kraus, Donald A. Bobo, R. I. Kilroy, F. T. Lynch and Frank Mazur; and

WHEREAS, the Defendant Class is divided into two subclasses, the Retiree Subclass and the Active Subclass; and

WHEREAS, the Retiree Subclass, represented by Anthony P. Santoro, Sr., is made up of all members of the Defendant Class who retired or terminated service under the Plan prior to January 1, 1999, and their beneficiaries; and

WHEREAS, the Active Subclass, represented by George Thomas DeBarr, is made up of all members of the Defendant Class who had not retired or terminated service under the Plan as of January 1, 1999, and their beneficiaries; and

WHEREAS, the relief the Trustees seek in the Action could adversely affect the interests of certain members of the Defendant Class; and

WHEREAS, the representative of the Retiree

Subclass has asserted that the Trustees are not entitled to the equitable relief sought in the Action; and

WHEREAS, the representative of the Active Subclass has asserted that certain benefits provided to certain members of the Retiree Subclass should be eliminated; and

WHEREAS, the Trustees, the Retiree Subclass representative and the Active Subclass representative wish to resolve their differences without resort to further litigation; and

WHEREAS, the Trustees have determined, after due consideration, that settlement of the Action under the terms of this Agreement is in the interests of the Plan's participants and beneficiaries;

NOW THEREFORE, in consideration of the mutual promises and covenants set forth herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Trustees, on behalf of the Plan: the Retiree Subclass representative, on behalf of the Retiree Subclass; and the Active Subclass representative, on behalf of the Active Subclass, hereby agree to the following terms.

1. This Agreement is effective on the date that an order issued by the United States District Court for the District of Maryland ("Court") approving the Agreement pursuant to Rule 23 of the Federal Rules of Civil Procedure and dismissing the Action ("Order") becomes final ("Final Order"). The Order is a Final Order when the time for filing an appeal with respect to the Order has expired and no appeal has been filed or an appeal otherwise has been foreclosed or, if appealed, the Order is affirmed and all rights to further appeal or review by any person have been exhausted or foreclosed.

2. The Executive Council of the Transportation Communications International Union ("TCU") has adopted amendments to the Plan

("Amendments"), contingent on the issuance of a Final Order. Under the Amendments, a copy of which is attached hereto as Exhibit 1:

a. Members of the Retiree Subclass who retired before January 1, 1991 will receive (i) a cost of living adjustment ("COLA") equal to 7.5% of the member's monthly retirement benefit effective January 1, 1999 and (ii) a COLA equal to 3% of the member's monthly retirement benefit effective January 1, 2002;

b. Members of the Retiree Subclass who, before January 1, 1991, had not retired but had terminated service under the Plan with a vested benefit under the Plan will receive (i) a COLA equal to 5% of the member's monthly retirement benefit beginning on the date of retirement and (ii) a COLA equal to 5% of the member's monthly retirement benefit beginning on the first anniversary of the member's retirement;

c. Members of the Retiree Subclass who retired or terminated service under the Plan with vested benefits between January 1, 1991 and December 31, 1998, will receive three COLAs, each equal to 10% of the member's monthly retirement benefit, but not to exceed the increase in the cost-of-living index for the three calendar year period immediately preceding the calendar year in which the COLA is provided: such COLAs to be given on the third, sixth and ninth anniversaries of the member's retirement; and

d. For members of the Active Subclass, the 2% accrual rate under the Plan's benefit formula will be restored retroactive to January 1, 1995.

3. The Trustees have obtained a written commitment ("Commitment") from the Executive Council of TCU, contingent on the issuance of a Final Order, to take certain actions concerning the Plan. Under the Commitment, a copy of which is attached hereto as Exhibit 2, the Executive Council will:

a. Refrain from adopting any benefit improvements under the Plan (except those required by law) until (i) the Plan is amended to change the normal retirement date under the Plan to age 60 for all members of the Active Subclass, with a retroactive payment for any member of the Active Subclass who, prior to the amendment, retired before attaining normal retirement age, such retroactive payment to be in an amount that, together with the benefit being paid under the Plan, provides the actuarial equivalent of the benefit that would have been paid if the normal retirement date under the Plan had been age 60, and (ii) the Plan is amended to provide a COLA for all members of the Active Subclass equal to 10% of the member's retirement benefit beginning on the fifth anniversary of the member's retirement; and

b. Contribute to the Plan an amount not less than 17.5% of TCU's payroll from 1999 through the earlier of 2004 or the adoption of the benefits increases referenced in paragraph 3.a.

4. The Active Subclass and Retiree Subclass will not object to the Court's entry of an order, substantially in the form attached hereto as Exhibit 3. declaring that the amendment to the Plan providing for an automatic COLA effective January 1, 1991 ("1991 COLA Amendment") is null and void as of its inception and of no force or effect.

5. The Trustees will not seek to recover benefits paid under the 1991 COLA Amendment from any member of the Defendant Class.

6. Effective on the date the Order becomes a Final Order, for and in consideration of the undertakings described in this Agreement, the members of the Defendant Class (collectively, the "Releasing Parties") irrevocably and unconditionally release the Plan, the Trustees; any former Trustees; any other fiduciary of the Plan; the TCU and its subordinate bodies; and all of their officers, agents,

representatives, heirs, administrators, executors, directors, employees, attorneys, successors, and assigns (collectively, the "Released Parties"), from any and all demands, causes of action, fees, and liabilities of any kind whatsoever in law, by statute, or in equity, whether known or hereafter discovered and whether now or hereafter fully, partially, or not disclosed to the Releasing Parties, which the Releasing Parties ever had, now have, or hereafter can, shall, or may have against the Released Parties concerning the 1991 COLA Amendment and any and all actions and recommendations taken up through the effective date of this Agreement concerning the 1991 COLA Amendment or directly related to its effects, excepting only the obligations undertaken in this Agreement ("Released Claims").

7. The Releasing Parties acknowledge that they may hereafter discover claims relating to the 1991 COLA Amendment that are presently unknown or unsuspected or facts in addition to or different from those now known about the 1991 COLA Amendment. Nevertheless, the Releasing Parties by this Agreement release fully, finally and forever all matters released herein.

8. The Releasing Parties and any person acting on behalf of one or more Releasing Parties shall not file any lawsuit or other action asserting a Released Claim nor benefit from any lawsuit or other action asserting a Released Claim.

9. Upon issuance of the Order, this Agreement shall bind each member of the Defendant Class as a class in a class action maintained under Rule 23(b)(1) of the Federal Rules of Civil Procedure.

10. The Trustees shall promptly file a motion with the Court setting forth the substantive terms of this Agreement and seeking the Court's preliminary approval of the Agreement, accompanied by a proposed Notice of Settlement in a form mutually agreed upon by the Parties. Upon preliminary approval of the Agreement, the

Parties shall seek a date for a fairness hearing that allows at least 30 days notice to the members of the Defendant Class to consider the settlement. Within 15 days after the Court's preliminary approval, the plaintiffs shall cause the proposed Notice of Settlement, in the final form approved by the Court, to be mailed to each member of the Defendant Class. The Notice of Settlement shall identify the date of the fairness hearing and describe the rights of the members of the Defendant Class to object to the terms of the Agreement.

11. In accordance with prior agreements, TCU shall pay the reasonable attorney's fees and costs of the Active Subclass incurred in this Action. TCU further agrees to reimburse the Plan for all amounts expended by the Plan for the reasonable attorney's fees and costs of the Retiree Subclass incurred in this Action.

12. Any issues arising under the Agreement and any proceeding to enforce any term of the Agreement shall be subject to the exclusive jurisdiction of the Court, and the Parties stipulate and consent to venue for any such proceedings in the United States District Court for the District of Maryland.

13. If this Agreement is not approved by the Court or if a Final Order is not issued, the Agreement shall be null and void and without prejudice to the rights of any Party and shall not be used in any subsequent proceeding in any court.

14. If any provision of this Agreement is held to be illegal, void, or unenforceable by a court of competent jurisdiction, the provision shall have no force or effect. However, the illegality or unenforceability of such provision shall have no effect upon, and shall not impair the legality or enforceability of, any other provision of this Agreement.

15. Should any provision of this Agreement require interpretation or construction, it is agreed that the

court (or other tribunal) interpreting or construing this Agreement shall not apply a presumption against one Party by reason that a document is to be construed more strictly against the Party who prepared the document, it being agreed that all Parties have participated in the preparation of all provisions of this Agreement.

16. This Agreement shall be governed by, and construed and enforced in accordance with federal law and, to the extent not preempted, the laws of the State of Maryland, without regard to choice of law provisions.

17. This Agreement constitutes the entire agreement of the Parties concerning its subject matter, is intended to supersede all prior negotiations, understandings, and agreements, and there are no other written or oral agreements, understandings, representations, or obligations which, as of the date of the Final Order, shall have any further force or effect.

18. This Agreement shall not be changed, modified, or cancelled except by written agreement signed by all Parties.

19. This Agreement is binding upon, and shall inure to the benefit of the Parties and their respective heirs, executors, administrators, successors and assigns.

20. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

R. A. SCARDELLETTI, HOWARD RANDOLPH and JOEL PARKER, as Trustees of the Transportation Communications International Union Staff Retirement Plan

Dated: _____ _____

Dated: _____ _____

Dated: _____ _____

ANTHONY P. SANTORO, SR., Representative of the Retiree Subclass

Dated: _____ _____

GEORGE THOMAS DEBARR
Representative of the Active Subclass

Dated: _____ _____

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

USCS Const. Amend. 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

USCS Const. Amend. 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USCS Const. Amend. 7

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

USCS Const. Amend. 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS

ALL WRITS ACT, 28 U.S.C. § 1651(a)

(a) The Supreme Court and all courts established by Act of Congress may issue
all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

AGE DISCRIMINATION IN EMPLOYMENT ACT

29 USCS § 621

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(**b**) It is therefore the purpose of this Act [29 USCS §§ 621 et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

AGE DISCRIMINATION IN EMPLOYMENT ACT

29 USCS § 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

* * * * *

(c) Labor organization practices. It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

* * * * *

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation.

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

AGE DISCRIMINATION IN EMPLOYMENT ACT

29 USCS § 626. Recordkeeping, investigation, and enforcement.

* * * * * *

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

* * * * *

(f) Waiver.

(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(**A**) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(**B**) the waiver specifically refers to rights or claims arising under this Act;

(**C**) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(**D**) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(**E**) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(**F**) (**i**) the individual is given a period of at least 21 days within which to consider the agreement; or

(**ii**) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(**G**) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(**H**) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F))

informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(**i**) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(**ii**) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(**2**) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 [29 USCS § 623 or 633a] may not be considered knowing and voluntary unless at a minimum--

(**A**) subparagraphs (A) through (E) of paragraph (1) have been met; and

(**B**) the individual is given a reasonable period of time within which to consider the settlement agreement.

(**3**) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

EMPLOYEE RETIREMENT INCOME SECURITY ACT PROGRAM PROTECTION OF EMPLOYEE BENEFIT RIGHTS REGULATORY PROVISIONS PARTICIPATION AND VESTING

1. **The Anti-Cutback Rules**:

ERISA § 204. Benefit Accrual Requirements

* * * * *

(g) Decrease of accrued benefits through amendment of plan.

(**1**) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or 4281 [29 USCS § 1082(c)(8) or 1441].

(**2**) For purposes of paragraph (1), a plan amendment which has the effect of--

(**A**) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(**B**) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the of any participant in a more than de minimis manner. The Secretary of the Treasury

may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any--

(A) tax credit employee stock ownership plan (as defined in section 409(a) of the Internal Revenue Code of 1986 [26 USCS § 409(a)]), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of such Code [26 USCS § 4975(e)(7)]), shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

EMPLOYEE RETIREMENT INCOME SECURITY ACT PROGRAM PROTECTION OF EMPLOYEE BENEFIT RIGHTS

29 USCS § 1002. Definitions.

ERISA § 3 "Accrued benefit" definition.

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(23) The term "accrued benefit" means--

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3) [29 USCS § 1054(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 204(c)(2)(B) [29 USCS § 1054(c)(2)(B)] with respect to the employee's accumulated contribution.

29 USCS § 1132. Civil enforcement.

(a) Persons empowered to bring a civil action. A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(**B**) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * * * *

(**2**) by a participant, beneficiary, or fiduciary (**A**) to enjoin any act or practice which violates any provisions of this subchapter or the terms of the plan, or (**B**) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
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29 USCS § 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS § 1132] shall be applicable in the enforcement of this section.

(Pub.L. 93-406, Title I, § 510, Sept. 2, 1974, 88 Stat. 895.)

EMPLOYEE RETIREMENT INCOME SECURITY ACT PROGRAM PROTECTION OF EMPLOYEE BENEFIT RIGHTS

29 USCS § 1141. Coercive interference.

It shall be unlawful for any person through the use of fraud, force, violence,
or threat of the use of force or violence, to restrain, coerce, intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act. Any person who willfully violates this section shall be fined $ 10,000 or imprisoned for not more than one year, or both.

(Pub.L. 93-406, Title I, § 511, Sept. 2, 1974, 88 Stat. 895.)

INTERNAL REVENUE CODE

26 USCS § 411. Minimum vesting standards.

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(a)(7) Accrued benefit.

(**A**) In general. For purposes of this section, the term "accrued benefit" means--

(**i**) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3),
expressed in the form of an annual benefit commencing at normal retirement age, or

(**ii**) in the case of a plan which is not a defined benefit plan, the balance of the employee's account.

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(**D**) Accrued benefit attributable to employee contributions. The accrued benefit of an employee shall not be less than the amount determined under subsection (c)(2)(B) with respect to the employee's accumulated contributions.

INTERNAL REVENUE CODE

26 USCS § 411. Minimum vesting standards.

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(d) Special rules.

(6) Accrued benefit not to be decreased by amendment.

(A) In general. A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

(B) Treatment of certain plan amendments. For purposes of subparagraph (A), a plan amendment which has the effect of--

(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(ii) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary shall by regulations provide that this subparagraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The

Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).

Treasury Regulations

26 CFR § 1.401-1. Qualified pension, profit- sharing, and stock bonus plans.

(**a**) Introduction. (1) Sections 401 through 405 relate to pension, profit- sharing, stock bonus, and annuity plans, compensation paid under a deferred-payment plan, and bond purchase plans. Section 401(a) prescribes the requirements which must be met for qualification of a trust forming part of a pension, profit-sharing, or stock bonus plan.

* * * * *

(**b**) General rules. (1)(i) A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. Retirement benefits generally are measured by, and based on, such factors as years of service and compensation received by the employees. The determination of the amount of retirement benefits and the contributions to provide such benefits are not dependent upon profits. Benefits are not definitely determinable if funds arising from forfeitures on termination of service, or other reason, may be used to provide increased benefits for the remaining participants (see § 1.401-7, relating to the treatment of forfeitures under a qualified pension plan). A plan designed to provide benefits for employees or their beneficiaries to be paid upon retirement or over a period of years after retirement will, for the purposes of section 401(a), be considered a pension plan if the employer contributions under the plan can be determined actuarially on the basis of definitely determinable benefits, or, as in the case of money purchase pension plans,

such contributions are fixed without being geared to profits. A pension plan may provide for the payment of a pension due to disability and may also provide for the payment of incidental death benefits through insurance or otherwise. However, a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses (except medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401-14).

TREASURY REGULATIONS

26 CFR § 1.411(a)-7 Definitions and special rules.

(a) Accrued benefit. For purposes of section 411 and the regulations thereunder, the term "accrued benefit" means --

(1) Defined benefit plan. In the case of a defined benefit plan --

(i) If the plan provides an accrued benefit in the form of an annual benefit commencing at normal retirement age, such accrued benefit, or

(ii) If the plan does not provide an accured benefit in the form described in subdivision (i) of this subparagraph, an annual benefit commencing at normal retirement age which is the actuarial equivalent (determined under section 411(c)(3) and § 1.411(c)-(5) of the accrued benefit determined under the plan. In general, the term "accrued benefits" refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (see section 411(a)(9) and paragraph (c)(3) of this section), life insurance benefits payable as a lump sum, incidental death benefits, current life insurance protection, or medical benefits described in section 401(h). For purposes of this paragraph a subsidized early retirement benefit which is provided by a plan is not taken into account, except to the extent of determining the normal retirement benefit under the plan (see section 411(a)(9) and paragraph (c) of this section). The accrued benefit includes any optional settlement at normal retirement age under actuarial assumptions no less favorable than those which would be applied if the employee were

terminating his employment at normal retirement age. The accrued benefit does not include any subsidized value in a joint and survivor annuity to the extent that the annual benefit of the joint and survivor annuity does not exceed the annual benefit of a single life annuity.

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